

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

EDWARD PHILLIP MCKENNA,
Plaintiff,
v.
T. CISNEROS, et al.,
Defendant.

No. 2:22-cv-01294-KJM-CKD P

ORDER

Plaintiff, a state prisoner proceeding pro se, has filed this civil rights action seeking relief under 42 U.S.C. § 1983. The matter was referred to a United States Magistrate Judge as provided by 28 U.S.C. § 636(b)(1)(B) and Local Rule 302.

On April 11, 2023, the magistrate judge filed findings and recommendations, which were served on plaintiff and which contained notice to plaintiff that any objections to the findings and recommendations were to be filed within fourteen days. Plaintiff has filed objections to the findings and recommendations.

In accordance with the provisions of 28 U.S.C. § 636(b)(1)(C) and Local Rule 304, this court has conducted a *de novo* review of this case. Having reviewed the file, the court finds the findings and recommendations to be supported by the record and by the proper analysis.

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Accordingly, IT IS HEREBY ORDERED that:

1. The findings and recommendations filed April 11, 2023, are adopted in full, including the orders preceding those recommendations, to the extent necessary under 28 U.S.C.

§ 636(b)(1).¹

2. The Eighth Amendment excessive force claim alleged to have occurred on February 18, 2021 involving defendants Cisneros, Leahy, Garcia, Tyler, Coronado, Sayama, Diaz, Brown, Dunn, Valdez and Knudson is dismissed for failing to state a claim upon which relief may be granted.

3. Plaintiff may file a third amended complaint within 30 days, limited to no more than 25 pages in length. Leave to amend is only granted with respect to the excessive force and failure to protect claims as well as any supplemental state law claim of assault and battery against defendants Cisneros, Leahy, Garcia, Tyler, Coronado, Sayama, Diaz, Brown, Dunn, Valdez and Knudson. Failure to file an amended complaint that complies with this order may result in the dismissal of this action under Rule 41(b) of the Federal Rules of Civil Procedure.

4. The First Amendment retaliation claim against defendant Cisneros is dismissed without further leave to amend for failing to state a claim upon which relief may be granted.

5. All defendants employed at Corcoran State Prison, Mule Creek and CMF are dismissed without prejudice to plaintiff's filing new lawsuits based on their improper joinder to the present action.

6. Plaintiff's motions for emergency injunctive relief (ECF Nos. 37, 40, 48) are denied.

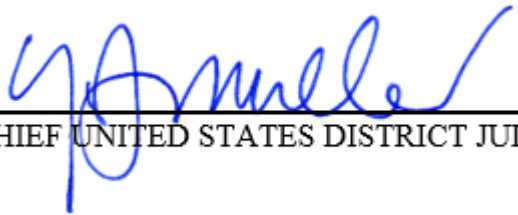
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¹ While the Magistrate Judge previously issued an order granting leave to amend, amendment only became necessary after she dismissed one of the claims. It does not appear the Magistrate Judge had the authority to dismiss the claim involuntarily. *See* 28 U.S.C. § 636(b)(1)(A) (“[A] judge may designate a magistrate judge to hear and determine any pretrial matter pending before the court, except a motion ... to dismiss for failure to state a claim upon which relief can be granted, and to involuntarily dismiss an action.”). And dismissal is not permissible simply because the Magistrate Judge permitted an amendment. That said, if the plaintiff elected to stand by his original allegations, in that case the order would be final.

1 7. This matter is referred again to the assigned Magistrate Judge for all further pretrial
2 proceedings.

3 DATED: September 29, 2023.

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7 CHIEF UNITED STATES DISTRICT JUDGE
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